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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-322

DENNIS HOGAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL. PEYTON H. KUNCE, Circuit Judge,

Respondent.

(On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED FOR REVIEW

1. (a). Whether the Illinois Supreme Court was constitutionally justified in applying the relevant Illinois law and finding that malicious intent is not required to support a conviction on a charge of criminal contempt, where the penalty imposed is a fine and 30 days in the county jail.

(b). Whether, if a finding of intent is required, the conduct of petitioner was such as to meet this requirement and was therefore contemptuous.

2. Whether any substantial federal question is raised by any of the following sub-issues:

(a). May an attorney whose client is about to be sentenced subsequent to his conviction for perjury, be properly found in contempt of court where he files a civil lawsuit unnecessarily naming as a defendant therein the sentencing judge, to contest an allegedly unfair bail procedure in which said judge played absolutely no part whatsoever?

(b). Where a contempt adjudication is predicated upon a number of independent counts, some of which allege privileged conduct, may the adjudication be affirmed on the basis of one of the counts which alleged non-privileged conduct?

(c). Was the Illinois Supreme Court correct in affirming the trial court's denial of a motion for substitution of judge where petitioner has failed to show an abuse of the trial court's discretion?

STATEMENT OF THE CASE

Respondent accepts the statement submitted by petitioner insofar as it relates to the nature and facts of the Coleson criminal trial for perjury and the presentencing report dispute. However, respondent submits the following account of the subsequent contempt proceeding in the interest of clarity.

Because of what he believed to be contemptuous conduct on the part of Hogan in filing the *Coleson* complaint, Judge Kunce cited that filing in two counts of contempt, in addition to the one concerning advice to his client not to talk to the presentence investigator. One count alleged that any suit should have been delayed until sentence has been passed (C. 18). The other count alleged that the filing of the suit was contemptuous because the "complaint has no basis in law or in fact"; that it was "spurious, invented and contemptuous per se"; and that it was not filed "in good faith . . . but so as to hinder, delay or impede the administration of criminal justice . . ." (C. 19).

On his own motion Judge Kunce directed that the contempt citations be heard before a different judge. The Honorable John Clayton, Chief Judge of the circuit, assigned himself to hear the case.

Coleson and Hogan moved for the assignment of a judge from outside the circuit (C. 32). This motion was denied by Judge Clayton as he felt he could be fair and impartial in hearing the charges against petitioner and his client (R. 6).

At the subsequent contempt hearing, in their stipulated position, the People supported the contempt citation against petitioner Hogan by arguing that the complaint filed in *Coleson* v. *Spomer* was filed to disrupt the court or embarrass the court so as to lessen the court's dignity and authority. (R. 33, 34).

In his stipulated position, counsel for petitioner Hogan set forth that attorney Hogan filed a civil suit alleging improper bail practices against the circuit court and three of its judges based on his conclusions from his reading of *O'Shea* v. *Littleton,* 414 U.S. 488, 94 S. Ct. 669 (R. 35, 36). Counsel for petitioner argued that the courts are embarrassed and their dignity and authority is lessened anytime there is a suggestion of possible lack of total objectivity (R. 56). Petitioner stated that no evidence existed to support an element of obstruction and a lack of good faith, but instead was disproved in that the judge disclaimed any prejudice from the filing of the civil suit (R. 56, 57).

Subsequently, points and authorities were submitted to the court by the People (R. 64-66) and the petitioner (R. 71-76), and a second proceeding was held before Judge Clayton on May 27, 1974 (R. 77).

The People argued that the possibility that bail bond procedures may have been incorrectly handled did not necessitate the filing of a $100,000.00 civil suit against the judge presiding in Coleson's pending perjury trial (R. 83), that the presiding judge was faced with imposing sentence on Coleson as required by statute at the time the civil suit was filed (R. 82, 83), that the *Littleton* decision did not dictate the filing of civil suits requesting monetary damages against a judge to preserve a point for review (R. 85), and that the law clearly indicated a judge of general jurisdiction is immune from civil suits for acts done in performance of his official duties (R. 87).

Counsel on behalf of petitioner argued that the State had offered no suggestion of any alternative methods to filing the civil suit against the circuit court and its judges (R. 93, 94) and that though a substantial body of law established that judges are exempt from suit, the petitioner

had a right to attack such body of law, while a criminal case was pending, by filing a civil suit against the judges (R. 94).

Upon consideration of all the evidence, Judge Clayton entered an order finding petitioner Hogan guilty of contempt (R. 99-106). It stated that petitioner had filed a civil action against the presiding judge and other judges for damages growing out of the Court's discretionary ruling (R. 102), and such civil action had no basis in law or fact for damages or other relief as to the Presiding Judge (R. 102). The contempt order stated that the civil suit had in fact interfered with the judicial processes (R. 102), that the civil suit at that time was not required by any statute of limitations, or otherwise required by state or federal case law, and that the suit could have been filed after the presiding judge had passed sentence in the criminal proceedings so as not to delay, hinder, or impede the administration of justice, nor cause the Presiding Judge to be embarrassed (R. 103). In addition, the contempt order declared that the civil complaint was not filed by petitioner in good faith to obtain the relief prayed for but in order to hinder, delay, or impede the administration of justice, and to interfere with the judicial processes, and to embarrass the court so as to lessen the court's dignity and authority (R. 103).

Consequently, Judge Clayton imposed on petitioner a $2,250 fine ($750 for each of the three counts), a thirty-day jail sentence, and reference to the Illinois lawyer disciplinary authority for professional sanctions.

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The remaining relevant facts concerning the civil action filed by petitioner and the decisions of the Illinois Appellate and Supreme Courts on appeal of the contempt adjudication are adequately set forth in petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

I.

THE ILLINOIS SUPREME COURT WAS CONSTITUTIONALLY CORRECT IN HOLDING THAT SPECIFIC INTENT NEED NOT BE SHOWN TO SUSTAIN THE CONTEMPT CONVICTION.

Petitioner urges this Court to accept, as a principle of constitutional law, the Illinois Appellate Court's holding that a conviction for criminal contempt of court may not be sustained absent proof of criminal intent on the part of the alleged contemnor. However, an examination of the relevant law on the subject, with its historical background, and of the facts of this case leads inevitably to the conclusion that the Illinois Supreme Court was constitutionally correct in reversing the appellate court and holding that whether such a contempt has been committed depends upon the *act* and not the alleged intention of the offending party. (Appendix to petitioner's brief at 29).

The history of contempt in the common law (see Petition at p. 2) and the decisions of this Court on the elements of analogous regulatory offenses indicate that a finding of specific intent is not necessary to sustain a convicion for the nonserious type of criminal contempt of which petitioner stands convicted. This court, in the case of *Morissette* v. *United States,* 342 U.S. 346 (1952) explicitly recognized a certain category of offenses which, although distinguishable from such offenses as treason, are regarded as offenses against the authority of the state and by their doing result in injury to the state whatever the intent of the violator. Such offenses are of the type that cause impairment of the efficiency of controls deemed essential to the social order, and the penalties for the

violation thereof are usually relatively small. The then majority of this Court recognized, apparently with approval, that courts have held that the offending act alone makes out the crime and no intent need be shown. *Id* at 256.

It is this category of offenses into which petitioner's contempt conviction falls. Like those types of cases mentioned in *Morissette, supra,* this case reveals a situation where the act of the violator itself, regardless of his intent, disrupted the orderliness of "controls deemed essential to the social order", i.e., orderly judicial proceedings necessary to the prosecution of a crime against the People.

The penalty imposed on the single count before Your Honors was a $750 fine and a 30 day term in jail. Only the fine was sustained by the Supreme Court of Illinois. In a similar situation, a federal District Court in California found that, since no more than a 6-month sentence could be imposed upon the defendant for contempt for his failure to obey a grand jury subpoena, no specific intent was required for conviction. *United States* v. *Polizzi,* 323 F. Supp. 222, 226 (C.D. Cal. 1971), rev'd. on other grounds, 450 F. 2d 880 (9th Cir. 1971). In the instant case, since no maximum term that can be imposed for criminal contempt is prescribed by Illinois statute, we can look to the penalty actually imposed as the best evidence of the seriousness of the offense. *Bloom* v. *Illinois,* 391 U.S. 194, 211 (1968). The penalty given shows that the offense for which petitioner stands convicted was clearly a non-serious offense, not requiring a finding of specific intent under the principles announced in *Morissette* and *Polizzi, supra.*

The relevant state case law supporting respondent's position is set forth in the decision of the court below (Appendix to petitioner's brief, p. 27 *et seq.*) and there-

fore there is no need to restate it here. However, a number of the points raised by petitioner on this matter deserve to be responded to in more detail.

Contrary to petitioner's contention at page 16 of his brief, the Illinois Supreme Court's citing of *People* v. *Denson,* 59 Ill. 2d 546 (1975) does not show that the court failed to distinguish between civil and criminal contempt, because that case was not "essentially" a civil contempt case. In fact, that case presented a somewhat unique situation in that the trial judge had issued a single contempt order covering both civil and criminal contemptuous conduct. *Id.* at 556. Furthermore, petitioner's statement that the court below relied on the *Denson* case is incorrect since the opinion clearly states that the case was cited only as being "[t]o the same effect" as the holding in *Anderson* v. *Macek,* 350 Ill. 135 (1932). (A. 30).

The cases of *In Re Brown,* 454 F. 2d 999 (D. C. Cir. 1971) and *United States* v. *Seale,* 461 F. 2d 345 (7th Cir. 1972) (to the extent it may differ from the holding below) are distinguishable in that they involve federal rather than state contempt situations. Additionally, *Seale* involved a construction of a federal contempt provision, 18 U.S.C. § 401, whereas the case at bar concerns the validity of the holding of the highest court of a state as developed by the relevant prior case law of the state.

Petitioner's reliance on *Smith* v. *Goguen,* 415 U.S. 566 (1974) is misplaced. That case was concerned with a vagueness challenge to a law making public contemptuous treatment of the flag of the United States a criminal violation. The statute was declared void for vagueness because the term "contemptuous treatment" was not defined. The case patently has no applicability to the case at bar since no statute is here being construed and no "void for vagueness" claim has been raised.

II.

PETITIONER'S CONDUCT WAS SUCH THAT HIS CONVICTION FOR CONTEMPT WOULD BE SUPPORTABLE EVEN IF INTENT WAS REQUIRED TO BE PROVED.

Although the United States Court of Appeals for the Seventh Circuit in *United States* v. *Seale, supra,* upheld the requirement of general intent in federal criminal contempt cases, the court held that to meet this requirement, it was *not necessary* to show "an actual design to subvert the administration of justice", but rather, "the minimum requisite intent is better defined as a violational act done by one who knows or should reasonably be aware that his conduct is wrongful". *Id.* 461 F. 2d at 368. This holding clearly does not set up a specific intent requirement of the type advocated by petitioner and is not inconsistent with the decision of the Illinois Supreme Court below.

If the *Seale* standard should be held to be applicable to the state criminal contempt conviction of the case at bar, petitioner's conduct clearly evidenced the requisite intent.

As the People in the trial court pointed out, under the doctrine of *O'Shea* v. *Littleton,* 414 U.S. 488 (1974) it was not necessary for petitioner to file a civil damage suit before sentence to acquire a forum in which to air his concern over bail procedures (this is discussed in depth in the following section). The suit could have been filed after sentencing without prejudicing any right of the complainant, and by filing the suit before sentencing, the administration of justice was hindered and obstructed and the dignity and objectivity of the court was compromised.

Petitioner is an attorney, well aware of the doctrine of judicial immunity, and the complaint he willfully filed was a total contradiction to that doctrine. Furthermore, although Judge Kunce was named as a party defendant, the

complaint did not even allege facts that the judge took any action in the bail procedures which were the basis of the complaint. As the Illinois Supreme Court aptly noted, "Judge Kunce could have been omitted entirely from the civil action without doing violence to Hogan's interpretation of the holding in *O'Shea.*" (A. 31).

As an attorney, petitioner could reasonably be deemed to have known that the filing of such a civil suit, unnecessarily naming the very judge presiding over his client's pending case during the delicate interim between conviction and sentence when there was a dispute over cooperation in the pre-sentence report, would undoubtedly cause disruption of the pending criminal proceeding. Yet, he willfully filed the suit anyway. Clearly such conduct falls within the realm of an "intentional contempt" as outlined in *Seale, supra.*

III.

NO SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THE PETITION ON THE FOLLOWING SUB-ISSUES:

A.

An Attorney, Whose Client Is About To Be Sentenced On His Conviction For Perjury, May Properly Be Found In Contempt Of Court Where He Files A Civil Lawsuit, Naming As A Defendant Therein The Sentencing Judge, To Contest An Allegedly Unfair Bail Procedure In Which The Judge Played Absolutely No Part Whatsoever.

Petitioner asserts that the holding of *O'Shea* v. *Littleton*, 414 U.S. 488 (1974) necessitated his filing of the civil suit against Judge Kunce and others, after the conviction and before the sentencing of his client, so as to avoid dismissal

in such a suit for lacking of standing. However, this misreading of the *O'Shea* opinion becomes obvious when one considers that this Court in fact said much more in that case than that the plaintiff class therein lacked standing to seek injunctive relief.

This Court, in *O'Shea,* after determining that no actual case or controversey was alleged in regard to the allegedly illegal bond-setting, sentencing and jury-fee practices in criminal cases engaged in by a magistrate and a circuit court judge, pointed out that state and federal procedures were available to parties who were prosecuted and faced trial or were illegally sentenced. Your Honors went on to state:

> Open to a victim of the discriminatory practices asserted under state law are the right to a substitution of judge or a change of venue, Ill. Rev. Stat., Ch. 38, §§ 114-5, 114-6 (1971), review on direct appeal or on post-conviction collateral review, and the opportunity to demonstrate that the conduct of these judicial officers is so prejudicial to the administration of justice that available disciplinary proceedings, including a possibility of suspension or removal, are warranted. Ill. Const. Art. VI, § 15(e). In appropriate circumstances, moreover, federal habeas relief would undoubtedly be available. 414 U.S. 488 at 502.

Respondent would also point out that the Illinois Supreme Court has specifically provided defendant a right to appeal from bail orders before conviction pursuant to Rule 604(c). Ill. Rev. Stat., 1973, Ch. 110A, § 604(c). Petitioner apparently chose not to avail himself of the proper remedies for the alleged grievance over the fixing of Coleson's bail. A logical reading of these alternatives would clearly seem to dispel any indicia of a "catch 22" situation being presented with regard to the contestation of bail procedures in Alexander County.

Furthermore, as the Illinois Supreme Court properly noted, even assuming the correctness of petitioner's assertion that standing to contest the alleged bail practices would have been lost to him had he not filed his suit prior to sentencing; this does not justify the inclusion of Judge Kunce as a defendant in the civil action. (A. 30). The Court elaborated as follows:

> Judge Kunce did not participate in setting bail for Coleson. The only allegations in the damage suit dealing with Judge Kunce are that he "purported to exercise the administrative authority of the Illinois Supreme Court to effect an administrative flowing together" of the two cases filed against Coleson and that this was a "continuation of the wrongful attachment and false imprisonment" of Coleson which had begun with the setting of bail. Precisely what these allegations signify, we do not know. Presumably, Judge Kunce entered an order consolidating the two criminal cases, which, of course, has nothing to do with the setting of bail. Judge Kunce could have been omitted entirely from the civil action without doing violence to Hogan's interpretation of the holding in O'Shea. The fact that he chose instead to include the presiding judge in the criminal case as a defendant in a $100,000 damage suit lends itself to the reasonable inference that the suit was calculated to affect the outcome of the case (*People* v. *Goss* (1957), 10 Ill. 2d 533) or to embarrass, hinder, or obstruct the court or derogate from the court's authority or dignity or to bring the administration of law into disrepute. (A. 30-31).

Petitioner seeks to overthrow this determination by characterizing it as violative of the doctrine announced in *Eaton* v. *Tulsa*, 415 U.S. 679 (1974). He asserts that "to affirm [Judge Kunce's contempt] citation on the theory that the suit was improper because it included one defendant too many, is to convict the petitioner of a charge never made against him. *Eaton* v. *Tulsa, supra.*"

The situation presented in *Eaton* is, however, distinguishable from that presented in the case at bar. This Court in *Eaton* found that the trial judge had rested a contempt conviction solely upon the use of a vulgar expletive by the defendant in open court. Your honors accordingly held that the Appellate Court's affirmance of the contempt conviction on the ground that the trial record revealed certain "discourteous responses" by the defendant to the trial judge was violative of due process since the defendant's conviction was sustained "upon a charge not made." 415 U.S. at 699.

In the instant case, petitioner was charged with three counts of contempt. Since the Illinois Supreme Court affirmed the conviction only on the basis of Count III, however, an examination of this count is necessary to determine if the charges made therein are reasonably to be found to encompass the conduct of petitioner which that Court declares to be supportive of the contempt conviction.

The trial judge stated in his order finding petitioner guilty of contempt that, *inter alia,* "the conduct and actions of defendant Dennis Hogan as set forth in Count III of the Rule to Show Cause was contemptuous". (R. 104). The charges made in Count III (C. 19) set forth a number of reasons why Judge Kunce felt that petitioner's filing of his civil action before sentencing was contemptuous. The Illinois Supreme Court's finding that the Judge could have been omitted from the civil action entirely can more than reasonably be said to fall within the scope of the charges made in points 6, 7 and 8 of Count III.

Therefore, it simply cannot be said that the Illinois Supreme Court sustained the trial court by treating the conviction as a conviction upon a charge not made, *Eaton supra,* 415 U.S. at 699, and the Court's finding should be upheld.

B.

The Contempt Adjudication Was Predicated Upon A Number Of Independent Counts, And The Adjudication May Properly Be Affirmed On The Basis Of One Of Those Counts.

Petitioner's argument that Count III, upon which his contempt conviction was affirmed, and Count I, alleging what has since been determined to be constitutionally protected conduct and not now before this Court, are "inextricably inter-related" (Br. 23) and that to uphold the conviction on a basis of Count III only is, therefore, a denial of due process, is imaginative but not logical or, for that matter, supported by the record.

Count I related to the petitioner's advising of his client not to answer certain questions propounded to him by the prosecution during an attempt to prepare a presentence report. The Illinois Appellate Court reversed petitioner's conviction on this Court finding his actions to be constitutionally protected under the doctrine of *Maness* v. *Meyers*, 419 U.S. 449 (1975). The state did not seek review of that part of the Appellate Court's reversal. Count II and III related, however, various charges surrounding petitioner's filing of a civil suit against Judge Kunce before sentencing. In that suit, petitioner sought to challenge bail procedures. How the filing of such a suit is "inextricably inter-related" with advice on Fifth Amendment privileges, respondent is unable to fathom. Each count stands on the respective allegations set forth in the Rule to Show Cause, and to urge that a conviction upon one count must be overturned because the conviction could not constitutionally be based on another count is ludicrous.

C.

The Trial Judge In The Original Trial, May Not Reasonably Be Deemed To Have Issued The Rule To Show Cause As A Defensive Tactic In The Civil Suit Filed By Petitioner.

Petitioner seeks to have this Court regard Judge Kunce's legitimate and justifiable issuance of the Rule to Show Cause as a use of official process to defend himself as a litigant. The weakness of this claim becomes obvious when one considers that the judge had obvious judicial immunity from such a suit. [*Bradley* v. *Fisher,* 13 Wall. 335, 20 L. Ed. 646 (1871), *Pierson* v. *Ray,* 386 U.S. 547 (1967)] and he therefore had no personal need to issue a show cause rule in order to defend himself. Judge Kunce issued the rule to initiate a procedure wherein petitioner could have to answer for his conduct—not as an unnecessary attempt to justify his own conduct.

It is true, as petitioner asserts, that every American Lawyer has the privilege of attempting to persuade the judiciary to change the law. But that fails to recognize the concomitant rule that such attempts must be by other than contemptuous methods.

D.

The Illinois Supreme Court's Affirmance Of The Trial Court's Denial Of The Petition For Substitution Of Judges Was Proper Since No Abuse Of Discretion Was Shown.

As regards the hearing of the contempt charges against petitioner and his client, Judge Kunce who had issued the rule to show cause properly recused himself from conducting the hearing and Judge Clayton, by virtue of his authority as the Chief Judge of the Circuit, assigned himself to hear the case. Petitioner's pre-trial petition for

substitution of judges, by which petitioner sought to have every judge in the circuit disqualified and to have a judge assigned from outside the circuit was denied by Judge Clayton, stating that "I feel I can be as fair and impartial in a hearing toward Mr. Hogan and Mr. Coleson as I could toward anybody at any time." (R. 6).

The Illinois Supreme Court, in affirming Judge Clayton's denial of petitioner's motion, stated the Illinois law on the matter and its conclusion as follows:

> Section 114-5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat., 1975, Ch. 38, par. 114-5) provides that in criminal cases there is an absolute right to a substitution of judges from two judges on general allegations of prejudice. The statute also provides for an unlimited number of substitution of judges for cause. It is well settled that a general allegation of prejudice will not, however, support a motion to substitute more judges than is authorized by the statute, and the naming of a greater number of judges in a petition for substitution than is authorized by statute warrants the denial of the entire petition. (*People* v. *Myers* (1966), 35 Ill. 2d 311; *People* v. *Goss* (1960), 20 Ill. 2d 224; *People* v. *Chambers* (1956), 9 Ill. 2d 83.) The same principle applies in civil actions. (*Rosewood Corp.* v. *Transamerica Insurance Co.* (1974), 57 Ill. 2d 247.) The request of the petition for substitution from all of the judges in the circuit, supported only by a general allegation of prejudice, justified Judge Clayton's denial of the petition. (A. 31-32).

Petitioner's contention that he in fact had alleged not general, but specific allegations of prejudice in his motion for substitution of judges and that the Illinois Supreme Court's affirmance of the denial of his motion on the ground that he made only general allegations was error serves only to state the argument—not to answer it.

If petitioner seeks to have his motion regarded as a motion for substitution for cause, he must meet the additional burden of showing that Judge Clayton's denial of that motion was an abuse of discretion. *People* v. *Nickols,* 41 Ill. App. 3d 974, 354 N.E. 2d 474, 479 (3rd Dist. 1976); *People* v. *Goodwin,* 13 Ill. App. 3d 506, 301 N.E. 2d 126 (1st Dist. 1973) (abstract). This rule takes cognizance of the fact that the trial court is ordinarily in the best position to determine whether it harbors prejudice against a defendant and is unable to continue in the case in a fair and impartial manner. *People* v. *Nikols, supra., citing People* v. *Polk,* 55 Ill. 2d 327, 303 N.E. 2d 137 (1973). Judge Clayton, as evidenced by his statement repeated above, obviously felt that he could conduct the hearing on the charges of contempt in a fair and impartial manner regardless of what he may have theretofore expressed to be the feelings toward petitioner of a majority of the other judges in the circuit. Petitioner has failed to show that this determination by the Chief Judge was an abuse of this discretion and, accordingly, this claim must fail.

CONCLUSION

For all the foregoing reasons, respondent urges this Honorable Court to deny the instant petition for a Writ of Certiorari.

Respectfully submitted,

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